INTERIOR BOARD OF INDIAN APPEALS

Clark L. Brurud v. Eastern Oklahoma Regional Director, Bureau of Indian Affairs

39 IBIA 51 (05/21/2003)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

CLARK L. BRURUD, Appellant	:	Order Affirming Decision
v.	:	
	:	Docket No. IBIA 02-71-A
EASTERN OKLAHOMA REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	May 21, 2003

On March 4, 2002, the Board of Indian Appeals (Board) received a notice of appeal from Appellant Clark L. Brurud, an officer of Stockbridge Energy, L.L.C. (Stockbridge). Appellant is the assignee of Osage Nation Oil Leases Nos. 14-20-G06-11136, 14-20-G06-11137, and 168Ind3212-1. Appellant sought review of a February 8, 2002, decision of the Eastern Oklahoma Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning maintenance of an oil field road. On September 18, 2002, the Board received an appeal from Appellant in regard to an August 15, 2002, supplemental decision issued by the Regional Director. For the reasons discussed below, the Board affirms both of the Regional Director's decisions.

On April 23, 2001, the Osage Agency Minerals Branch, BIA, sent notice to Stockbridge to complete the repair of the oil field road, among other things, on Lease No. 14-20-G06-11136 by May 21, 2001. Between April and July 2001, several meetings were held among BIA, Appellant, Appellant's father, and the surface fee landowner (landowner). Stockbridge objected to BIA's requirement that it repair the road because it wanted the landowner, his agricultural lessee, and certain hunters to contribute to the cost of the road repair for their alleged combined use of the road.

On July 3, 2001, BIA again met with Stockbridge and the landowner, and advised Stockbridge that the road repair would be "required of [it] and that [it] would not be allowed to sell any oil until it was all completed, and [BIA] also told [Stockbridge] that [its] tanks had already been sealed with agency seals." Administrative Record at Tab 8. The Regional Director ordered the seals removed on August 3, 2001.

On August 2, 7, and 10, 2001, the Superintendent, Osage Agency, BIA (Superintendent), ordered Appellant to repair the road, and on August 10, 2001, he began assessing fines for Stockbridge's failure to comply with 25 C.F.R. Parts 226.30, 226.28, and 226.42. On August 20, 2001, the Superintendent advised Appellant that a field inspection revealed that the work had been completed as of August 19, 2001, and assessed a total fine of $300. Stockbridge later paid the fine under protest.

Appellant appealed the Superintendent's August 2, 10, 17, and 20, 2001, decisions to the Regional Director. On February 8, 2002, the Regional Director affirmed the Superintendent's August 2 and 10, 2001, decisions. Appellant appealed the February 8, 2002, decision to the Board.

On May 13, 2002, during the briefing period for this case, the Regional Director informed the Board that her February 8, 2002, decision had not specifically addressed the Superintendent's August 17 and 20, 2001, decisions. The Regional Director stated her belief that her February 8, 2002, decision dealt with all of the substantive issues, but indicated that she would issue a decision including the August 17 and 20, 2001, decisions if the Board requested it. She further stated that, if she issued another decision, it would be consistent with her February 8, 2002, decision.

The Board gave Appellant the opportunity to state his position in regard to the necessity for another decision. Appellant stated that he wanted another decision. Therefore, the Board instructed the Regional Director to issue a supplemental decision. The Regional Director did so on August 15, 2002. The Board received Appellant's appeal from the August 15, 2002, decision on September 18, 2002.

Appellant filed his opening brief in regard to the Regional Director's February 8, 2002, decision before the Regional Director was requested to issue a supplemental decision. The Board gave him an opportunity to supplement that opening brief with another brief addressing the Regional Director's August 15, 2002, decision. The Regional Director filed an answer to Appellant's opening brief in regard to the February 8, 2002, decision. Appellant filed a reply brief and a supplemental opening brief. No other briefs were filed.

The Regional Director raised several issues which the Board addresses before reaching the merits of Appellant's arguments on appeal. First, she questions Appellant's standing. In light of the fact that the record shows that Appellant has been treated as an officer of Stockbridge throughout these proceedings, the Board declines to address this belated argument.

Next, the Regional Director contends that this appeal is moot because Appellant has repaired the road. Appellant repaired the road and paid the fines under protest. The Board finds that this appeal is not moot.

The Regional Director argues that Appellant failed to serve all interested parties because he does not show service on the agricultural lessee or the hunters. Neither BIA nor the Board knows who the agricultural lessee or hunters are. It is questionable whether Appellant knows who they are. If, when these individuals learn of this decision, they wish to contest it, they may file a petition for reconsideration.

The Board now turns to Appellant's arguments. Appellant contends that BIA lacked authority to require him to repair the oil field road. Appellant's lease incorporates the provisions of 25 C.F.R. Part 226 in setting forth standards for operating oil leases on the Osage Reservation. See Appellant's Lease No. 14-20-G06-11136, at paragraphs 2(D) and 3E. 25 C.F.R. 226.19(a) provides in pertinent part that the "Lessee shall conduct his/her operations in a workmanlike manner, commit no waste and allow none to be committed upon the land, nor permit any unavoidable nuisance to be maintained on the premises under his/her control." The language of this regulation is repeated in paragraph 1 of Appellant's lease. The Regional Director held that 25 C.F.R. § 226.19(a) required Appellant to maintain the road to the oil field, stating:

> In the present case, the Agency was attempting to prevent waste and nuisance on the land. The record reveals that the oil field road had large holes, which caused the operator and other persons to drive off the road and through the field. This in turn caused damage to the crops. Clearly, under the terms of the regulations, the Agency was entitled to require repair of the road to prevent waste to the remaining property. Thus, the Agency was simply enforcing the terms of the regulations.

Feb. 8, 2002, Decision at 3; Aug. 15, 2002, Decision at 3.

Appellant has made no attempt to show that his lease and the regulations do not support BIA's requiring him to repair the road. The Board finds that Appellant has not carried his burden of showing that BIA committed error in requiring him to repair the oil field road.

In addition, 25 C.F.R. § 226.28(c) authorizes the Superintendent "to shut in a lease when the lessee fails to comply with the terms of the lease, the regulations and/or orders of the Superintendent." Section 226.42 provides in relevant part that:

> Violation of any of the terms or conditions of any lease or of the regulations in this part shall subject the lease to cancellation by the Superintendent, or Lessee to a fine of not more than $500 per day for each day of such violation or noncompliance with the orders of the Superintendent, or to both such fine and cancellation.

Again, Appellant has not attempted to show how BIA erred either in prohibiting him from selling the oil in his tanks or in assessing a fine for failure to comply with the Superintendent's orders to repair the road. Accordingly, the Board finds that Appellant has not carried his burden of proving error as to these issues.

Appellant contends that BIA singled him out and discriminated against him by requiring him to perform road maintenance that was not required of other lessees operating on the Osage Reservation. Appellant alleges that this discrimination resulted from the fact that he is a non-Osage Native American doing business on the Osage Reservation. In support of his argument, Appellant presents two affidavits, one of which he presented for the first time in this appeal. The affidavit that was presented to the Regional Director is from the Manager of CDFA Services, which appears to be a private business working for Osage County, Oklahoma. The affidavit states in its entirety:

> In fulfilling the terms of the contract with Osage County in Oklahoma to identify oilfield related equipment not on the tax rolls, I have inspected several hundred leases and have not observed nor am I aware of any leases that have storage tanks that have been [sealed] or the lessee fined because of the lease roads lacking maintenance.

The new affidavit is signed by the owner of Kelley Well Service, who states that he is a contract pumper for Stockbridge. The affidavit is dated November 11, 2001, which is before the Regional Director issued her February 8, 2002, decision. Appellant gives no explanation as to why this affidavit was not submitted earlier. The affidavit alleges that the damage to the road was caused primarily by hunters, with contributions from the landowner's agricultural lessee and the landowner himself. The affidavit continues that, despite road maintenance performed by Stockbridge and despite efforts by Stockbridge and its contractors not to cause any other damage, the landowner "solicited the support of the Minerals Division of the B.I.A. and locked us out of the lease."

Appellant relies heavily on the affidavit from CDFA Services and contends that the Regional Director should have accepted this affidavit as proof of his allegations of discrimination. The Board finds that the Regional Director was correct in concluding that this affidavit did not establish discrimination. The affidavit merely says that the writer is not aware of other leases in which the oil tanks have been sealed or the lessee fined because of the lessee's failure to perform road maintenance. It says nothing about the condition of other oil field roads on the Reservation in comparison to the condition of Appellant's road. Neither does it indicate knowledge of whether BIA has had to order other lessees to maintain their roads. The Board finds that this affidavit provides no useful information in regard to Appellant's allegation of discrimination.

The Board is not required to consider the affidavit which Appellant apparently had when he was before the Regional Director, but did not submit until this appeal. Mosay v. Minneapolis Area Director, 27 IBIA 126, 132 (1995). However, even if it did consider this affidavit, it would find the affidavit unavailing. This affidavit addresses only the condition of Appellant's road and the writer's opinion as to who caused any damage. It does not compare the condition of Appellant's road to any other oil field road under BIA's jurisdiction or show that Appellant was required to do anything that was not required of other lessees.

In her decision, the Regional Director analyzed the discrimination charge under the standards established in Futernick v. Sumpter Township, 78 F.3d 1051 (6th Cir.), cert. denied, Futernick v. Caterino, 519 U.S. 928 (1996). The Board finds that it need not reach this discussion, because Appellant has failed to show the first prong of discrimination, i.e., disparate treatment.

Alternatively, Appellant argues that enforcement against him was motivated by personal animosity on the part of one of the BIA officials. Because Appellant has not shown disparate treatment, it is irrelevant whether or not the BIA official involved disliked him.

Appellant argues that Stockbridge should not have to bear the full cost of road maintenance because it is not the only user of the road. He contends that the road is also used by the surface landowner, the landowner's agricultural lessee, and hunters, all of whom should be required to contribute to the upkeep of the road.

Appellant has cited no legal authority giving BIA the right to require a contribution toward road maintenance from persons who are not doing business with an Indian tribe or individual and who have not taken any other action bringing themselves under BIA's regulatory jurisdiction. The Board is not independently aware of any such authority. If Appellant believes it has a right of reimbursement from other persons for its expenses in maintaining a road that those persons also use, he must bring an action in an appropriate court with subject matter jurisdiction.

Appellant requests reimbursement of his fines and damages for an unspecified amount of revenue lost, apparently, as a result of being locked out of the oil field. Based on the discussion above, the Board declines to order reimbursement of the fines Stockbridge paid.

Appellant also seeks money damages. To the extent that Appellant seeks those damages from BIA, the Board lacks jurisdiction to address his claim. As the Board has previously stated, it is not a court of general jurisdiction. Rather, it has only that authority delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against BIA. Simmons v. Northwest Regional Director, 38 IBIA 252, 254 (2002); Dailey v. Billings Area Director, 34 IBIA 128, 129 (1999).

The Board also lacks jurisdiction over Appellant's claim to the extent he seeks money damages from the landowner. Again, Appellant must seek any damages he thinks are owed to him by the landowner in an appropriate court with subject matter jurisdiction.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's February 8, 2002, and August 15, 2002, decisions are affirmed. 1/

//original signed
Kathleen R. Supernaw
Acting Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

1/ Any arguments not specifically addressed were considered and rejected.